93-705

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

JOSEPH PUDLO, M.D.,

Petitioner,

v.

E. ADAMSKI M.D., J. SCHNEIDER M.D., S. BORUSHEK, M.D., J. DADDINO M.D., GARY FAHRENBACH M.D., D. LARSON M.D., B. LEVY M.D., J. NABOLOTNY M.D., L. PANKAU M.D., V. VOHRA M.D. Individually, T.P. NASSOS M.D., E.W. BEUTEL M.D., Y. KIM M.D., J. COUGHLIN M.D., W. DAVIDSON M.D., F. GRABINER M.D., S. HADAWI, M.D., F. MARIANO M.D., D.L. MEYERS M.D., E.A. PETRUS M.D., L. PUPILLO, M.D., F. HEALEY M.D., A.R. MCCALL M.D., J. SCHNEIDER M.D., SISTER DONNA MARIA, CEO of the Hospital in their representative capacity and Resurrection Medical Center in Chicago, Illinois,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the intra-corporate immunity doctrine excludes from antitrust liability every hospital and each physician who engages in anticompetitive activity by abuse of the medical staff peer review process to exclude a competitor physician from the marketplace?

If certiorari is granted on issue I, review of the following, related issue is also sought:

II. Whether a hospital is vicariously liable for failure to actively supervise combinations of physicians who through service on medical Staff Committees abuse the medical staff peer review process to unfairly restrain trade with their horizontal competitors?

LIST OF THE PARTIES

All parties are named in the caption.

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OPINIONS BELOW

The reported opinion of the United States District Court for the Northern District of Illinois granting Defendants' motion to dismiss, *Pudlo v. Adamski*, 789 F. Supp.

247 (N.D. Ill. 1992), is reproduced in App. 1. That decision was affirmed by the United States Court of Appeals for the Seventh Circuit in an unpublished opinion and judgment Docket No. 92-1854 entered on August 9, 1993. They are reproduced in App. 14 and App. 18. An unpublished opinion of the Federal Magistrate is reproduced in App. 19.

STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on August 9, 1993. The statute that confers jurisdiction on this Court to review the judgment in question is 28 U.S.C. § 1254(1) and rule 10(1)(a) and (c) of this court.

STATUTORY PROVISIONS INVOLVED

The Sherman Act, §1 states in relevant part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . "

STATEMENT OF THE CASE

Petitioner, Doctor Joseph Pudlo filed suit under §1 of the Sherman Act against various physicians on the medical staff of Resurrection Medical Center, Chicago, and the hospital itself. Dr. Pudlo alleged that the primary motive

for defendants conducting a "purported" medical staff peer review was to eliminate Dr. Pudlo as a high volume, low cost competitor of various defendant physicians under the pretext of concern with improving patient care.

Dr. Pudlo bought an established medical practice in August 1990 from a retiring doctor, who had admitted his patients to the defendant Hospital for more than thirty years. Dr. Pudlo applied for and was appointed a provisional Member of the Medical Staff with unlimited privileges in Internal Medicine. Dr. Pudlo significantly enhanced the volume of patients by working longer hours and charging lower fees than his competitors.

Dr. Pudlo practiced without any objections from the Medical Staff or the Hospital for ten months until defendant Dr. Adamski, plaintiff's geographically closest competitor outside the hospital, warned Dr. Pudlo that his practice was in jeopardy. Several days later Dr. Pudlo received a certified letter from Dr. Adamski acting as the Chairman of the Internal Medicine Committee of the hospital asking for a written response. A medical record of an 85 year old patient who suffered from an extremely rare and incurable condition had been routinely identified for examination by the hospital's risk management team. The case had been referred to the hospital's quality assurance committee and then came to the attention of Dr. Adamski, who Dr. Pudlo alleged seized this occasion to conspire with other internists in order to eliminate Dr. Pudlo from the staff and thus eliminate competition from the market outside the hospital as well. (Amended Complaint (hereinafter Am. C.)¶37).

Defendant Adamski, Pudlo's geographically closest competitor (Am. C.¶9) had also requested defendant Maria, the hospital's chief executive officer (CEO), to order the hospital's quality assurance staff to reaudit Dr. Pudlo's medical records from his initial appointment to the staff. (Am. C.¶19) Dr. Pudlo alleges that he was summoned to appear in front of the Internal Medicine department of the hospital (consisting solely of competitors) and required to answer charges posed for the first time in that meeting without being permitted to examine patient charts which in one case were nearly a year old. The Hospital did not make the patient records available to Dr. Pudlo so he could respond. No particulars were given to Dr. Pudlo as to which if any of his patients' medical records would be reviewed.

Dr. Adamski had secretly met with a few competitor internists to reexamine Dr. Pudlo's patient charts so that these additional charges could be made. Dr. Pudlo alleged that Dr. Adamski and other defendants had decided to remove Dr. Pudlo and that at a subsequent meeting on August 9, Dr. Adamski and other competitor physicians sought a pretext for their anticompetitive actions against Dr. Pudlo. This pretext chosen entailed using the hospital peer review mechanism to exclude one of their competitors. Dr. Pudlo alleged that these competitor physicians were not seriously interested in hearing explanations of the actual medical care delivered. The Internal Medicine Committee recommended that Dr. Pudlo be terminated from the staff. The Internal Medicine Committee consisted solely of defendant internists. The Medical Executive Committee, which included both Dr.

Adamski and three other competitors (4 out of 16 members), and the hospital Governing Board automatically accepted the recommendation.

Under the hospital bylaws a hearing committee was subsequently convened, consisting of physicians who were not competitors of Dr. Pudlo. Although Dr. Pudlo was given only vague notice of the allegations against him, Dr. Pudlo was entirely successful in his defense before the hearing committee. After Dr. Pudlo presented evidence on his behalf to the hearing committee, the committee unanimously found in favor of Dr. Pudlo and unanimously recommended that Dr. Pudlo's staff privileges be continued.

However, termination was recommended by the Medical Executive Committee even though they had not yet received the final detailed hearing committee report exonerating Dr. Pudlo. The recommendation of the Medical Executive Committee was adopted by the Governing Board of the Medical Center (a board of non-physician laypersons). (The Hospital took the position that the standards applied to physicians already on the staff of the hospital were not as high as the standards applied to someone seeking admission to the staff. This position Federal Magistrate Guzman found illogical and disturbing.)

Dr. Pudlo alleged that the Medical Staff Committee generally follow the recommendation of the members who practice in the same field of medicine as the physician under review – i.e. that in this case the Medical Executive Committee deferred to the decision of the competitor internists. The hospital governing board also was

alleged to have rubber stamped the recommendation of the Medical Executive Committee without having before it the full record or giving Dr. Pudlo an opportunity to identify and present the errors of the various committees below.

Dr. Pudlo also alleged that Dr. Adamski and the hospital CEO Maria ignored clear Department Criteria for Removal from Provisional status: which required consideration of: "Satisfactory performances of quality assessment reviews," as the foundation of the candidate's evaluation. [Adherence with such departmental criteria is required for hospital accreditation.]

NATURE OF THE HOSPITAL MEDICAL STAFF RELATIONSHIP

A hospital and its self-governing medical staff are engaged in a cooperative venture to operate the hospital. The medical staff of a hospital consists of physicians accredited to the medical staff, who practice various specialties. As an internist, Dr. Pudlo competes with other internists in the Northwestern sections of Chicago medical care market, which market included, for Dr. Pudlo in particular, the market for Polish speaking patients. Chicago is the second largest city in the world in number of Polish speaking inhabitants. Internists such as Dr. Pudlo function as gatekeepers to hospitals – in many cases initially admitting patients to a hospital and providing referrals to other physicians in a hospital for specialized care such as that provided by surgeons or anesthesiologists.

A physician admitted to the staff of a hospital rarely derives direct payment from the hospital – but instead is paid by patients or their insurance companies for the physician's services. [Certain specialties are exceptions to this normal pattern – frequently these "hospital based physicians" such as pathologists are paid directly by the hospital.] On the other hand, hospitals are dependent upon the ability of gatekeeping physicians to admit paying patients. Hospitals and physicians are not direct competitors of each other – however, gatekeeping physicians compete with other similar physicians, including each medical staff member of any hospital to which a physician is admitted.

The economic interests of hospitals and staff physicians are clearly distinct from each other. Staff physicians who serve on hospital committees are thus potentially subject to a conflict of interest between their personal economic interest and the economic and other interests of a hospital.

Although the hospital board retains *de jure* power to disapprove particular actions the staff may recommend, it cannot discipline individual physicians directly or appoint non-physician officers to exercise direct authority over physicians in the practice of medicine.

The hospital medical staff organizational model with its crucial requirement of staff "selfgovernance" has long been mandated for hospital accreditation.[1] "If it is to tolerate professional quality assurance at all, antitrust law

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[1] Joint Commission on Accreditation of Health Care Organizations, Accreditation Manual 1992 Standard MS2.

must find ways of preventing the anticompetitive use of the power to label a practitioner as incompetent or neglectful of patient welfare." Havighurst, "Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships," 1984 Duke L.J. 1074, at 1151 *n7*. This Court has reviewed examples of peer review abuse in *Patrick v. Burget*, 486 U.S. 94, and *Summit Health Ltd. v. Pinhas*, ___ U.S. ___, 111 S.Ct. 1842, 114 L.Ed.2d 366 (1991).

DECISIONS OF THE SEVENTH CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

The Seventh Circuit affirmed the decision of the United States District Court for the Northern District of Illinois (adopting its reasoning), and in doing so expanded the intra-corporate immunity doctrine beyond what any other United States Circuit Court of Appeals had done.

The Seventh Circuit rested it affirmance on a conclusion of law and fact that recommendations by Pudlo's direct competitors which were reviewed by the Executive Committee and the Hospital Governing Board could not involve a conspiracy because "the staff were acting in the same way that an officer of a corporation would act in relation to the corporation." In footnote 2, of its opinion the Seventh Circuit found that any possible resulting taint was removed by the fact that final authority was vested in the Hospital's Governing Board.

Such approach is against this Court's precedents on grant of immunities, against Congressional policy on

enforcement of antitrust laws in this area of commerce and most importantly an unjust and unfair expansion of a narrow doctrine not suited for this case. The holding of the United States Court of Appeals for the Seventh Circuit means that as a matter of law a hospital cannot conspire with its medical staff who are involved in internal peer review, nor can members of the medical staff involved in such internal peer review conspire with other members of the medical staff.

REASONS FOR GRANTING REVIEW

THERE IS A CLEAR CONFLICT AMONG THE JUDICIAL CIRCUITS, MANIFESTED BY THIS DECISION AS TO THE SCOPE OF POSSIBLE SHERMAN ACT § 1 CONSPIRACIES WITHIN THE HOSPITAL MEDICAL STAFF AND BETWEEN THE HOSPITAL MEDICAL STAFF AND THE HOSPITAL ITSELF.

First, there is a profound conflict among the circuits on this very important point of federal law as the opinion of the United States Court of Appeals for the Seventh Circuit recognized in footnote 2. The particular finding of law by the Seventh Circuit, to the extent that it goes further than decisions of other circuits, also appears to stand in square opposition to the position of this Court regarding unconditional grants of immunity from potential Sherman Act liability to hospitals in *Patrick v. Burget*, 486 U.S. 94 (1988).

Second, as a practical matter the abuse of hospital peer review process by competing physicians has led to increased antitrust litigation regarding one of the most significant sectors of the United States economy, (one

seventh of the entire GNP or $820 Billion in 1992 (U.S. Health Care Financing Review, Fall 1992, Table 8.)). (See, *Pinhas*,) Exclusion of this sector of the economy from the ordinary application of section one of the Sherman Act results in the promotion of anticompetitive actions so long as the mantra "quality of care" is chanted. The anticipated results would be higher prices, lower quality of care and fewer choices to consumers. Group boycotts and other pressures upon peers to conform to anticompetitive practices of physicians with the practical power to control the peer review process in hospitals may have far greater impact upon the health care economy than the exclusion of one competitor, Dr. Pudlo, from a single hospital. Indeed, the threat of such peer review procedures in terms of practical economics, if carried out, are equivalent to a death sentence for a healthy medical practice if not to the entire future of a physician who has been accused of "substandard care." Such threats are so serious that few physicians are likely to resist such peer pressures. Few such cases are likely to ever be litigated. Some circuits extended this theory with exemptions and other rejected it, creating an irreconcilable split among the circuits.

Third, the decision of the Seventh Circuit in this case decides important issues of law in apparent conflict with several decisions of this court. The Seventh Circuit decision in *Pudlo* went even beyond limits given by this Court in *Patrick v. Burget; de facto* rendering moot that unanimous decision. Moreover, the limited intra-corporate *Copperweld v. Independence Tube Corp.*, 467 U.S. 752 (1984) doctrine, predicated on the relationship between a corporation and its wholly owned subsidiary, was vastly

broadened. This Court carved a narrow exception from the Sherman Act in *Copperweld*, 467 U.S. 752, at 776-777. ("[W]e also note that size of any such gap is open to serious question.")

Fourth, Congress has recently reviewed limited antitrust immunities available to the health care industry and found that proper cases for antitrust application are those where the process is abused by competitors.

Fifth, various governmental antitrust enforcement agencies frequently encounter cases of anticompetitive abuse by physicians and their enforcement powers neither should be weakened nor as in *Pudlo* completely foreclosed.

I. CONFLICT AMONG THE CIRCUITS

The Third, Eleventh, Ninth, Sixth, Second, and arguably the District of Columbia Circuits have found that competitors are not immune from Sherman Act § 1 if they abuse peer review process on the basis of the *Copperweld* doctrine. In *Weiss v. York Hospital*, 745 F.2d 786, 816 (3rd Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985) the Third Circuit was the first to refuse to extend intra-corporate immunity to the physician's competitors. The Third Circuit revisited this point of law without making any substantive changes in *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96 (3rd Cir. 1988), *cert. denied*, 849 U.S. 1078 (1989) Upon examination of evidence and finding that the Executive committee did not act at all on the facts alleged and absent allegation that it had any members who were plaintiff's competitors, the court held that the Executive Committee was not a combination as a matter

of law. Even *Nanavati's* (at 119 & 121) reasoning would distinguish it from *Pudlo,* who alleged The Executive Committees action involved four direct competitors. Therefore *Weiss and Nanavati* as matter of law make the actions of the Executive Committee a combination under Sherman § 1. Additionally, the Third Circuit in *Nanavati* refused to recognize individual members of the Staff acting as officers of the corporation, *de facto* recognizing the independent personal stakes exemption. *Id.* 118. The Court refused to reach the vicarious liability issue, because the plaintiff suffered no damage from the alleged conspiracy.

The Eleventh Circuit agreed with *Weiss, supra,* and held that members of a hospital's medical staff are fully capable of entering into a conspiracy among themselves in restraint of trade:

> We perceive no basis, however, for holding that the members of a medical staff are legally incapable of conspiring with one another. Each member practices medicine in his individual capacity; each is a separate economic entity potentially in competition with other physicians. *Bolt v. Halifax Hosp. Medical Center,* 891 F.2d 810, at 819 (11th Cir. 1990) *cert. denied,* 495 U.S. 924 (1990).

The Eleventh Circuit then logically concluded that the physicians serving under medical staff and its committees are independent legal entities, *Bolt v. Halifax Hosp. Medical Center,* 891 F.2d 810 (11th Cir. 1990), *cert. denied,* 495 U.S. 924 (1990) and "A hospital and the members of its medical staff, in contrast [to the unique considerations in

the ordinary corporate context] are legally separate entities, and consequently no similar danger exists that what is in fact unilateral activity will be bootstrapped into a conspiracy." 891 F.2d at 819.

The Eleventh Circuit considered yet another privileges dispute, *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438 (11th Cir. 1991) which arose outside of quasi-judicial peer review process, predicated on the Hospital's Board refusal to grant particular privileges to a neurologist, Todorov, in the Department of Radiology where the service was contracted to a group of radiologists. Todorov failed to demonstrate a genuine issue of material fact alleging conspiracy between the hospital and competing physician. The court reaffirmed its holding in *Bolt supra, Todorov* at 1455, and explained that *Copperweld* doctrine turns on the facts relative to physicians independence. *Todorov fn29* at 1455.

In *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440 (9th Cir. 1988), the Ninth Circuit recognized that "the M.D. anesthesiologists may have been the agents of St. Peter's for some purposes", however it declined to apply intra-corporate immunity doctrine because:

> "their interests were not as wed as the ties between a corporation and its officers or employees. St. Peter's did not pay the anesthesiologists a salary . . . Those interests were sufficiently independent so that the collaborative conduct between the anesthesiologists and St. Peter's coalesced economic power previously directed at disparate goals." *Oltz*, at 1450.

To distinguish *Oltz* on the grounds that the conspirators acted outside the peer review process, would constitute a

dangerous invitation to the federal judiciary to extend additional immunities for the most frequently abused, yet most powerful tool available to the health care industry so as to restrain competition. Production of this result by judicial adoption was precisely what this Court warned against in *Patrick* at 1665: *"This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such, is properly directed to the legislative branch. The Copperweld doctrine's application turns on the complete unity of interests between a corporation and the members of it's unincorporated subdivision and not on the type of activity that a subdivision is performing. Copperweld* 467 U.S. at 771. See also, *Spence v. Southeastern Alaska Pilot's Assn.*, 789 F. Supp. 1014, at 1022 (D. Alaska 1992).

In *Nurse Midwifery Associates v. Hibbett*, 918 F.2d 605 (6th Cir. 1991), *cert. denied* 112 S.Ct. 406 (1991) the Sixth Circuit applied the intra-corporate immunity to the hospital and its medical staff, but nevertheless refused to recognize the competitors as agents, *de facto* applying a personal stakes exemption.

The Second Circuit recognized the reality of the separate economic interests of independent practitioners with its decision in *Capital Imaging Associates P.C. v. Mohawk Valley Medical Associates, Inc.*, 996 F.2d 537, 544 (2nd Cir. 1993).

The D.C. Circuit does not have a split within as initially might appear. In *Okusami v. Psychiatric Institute of Washington*, 959 F.2d 1062, at 1064 (D.C.Cir. 1992) the court stated: "Interesting as these issues are, we need not resolve any of them today," because of the absence of

allegations of any competing interest between Dr. Hoffman, the medical director of the defendant, and the Institute. The court held on the pleadings in *Okusami* that the intra-corporate immunity doctrine applied. However, in *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C.Cir. 1986), cert. den. 479 U.S. 1033 (1987) a panel (including Judge Bork and then Judge now Justice Ginsburg) held *inter alia*: " . . . [T]he Atlas Board of Directors consisted of actual or potential competitors of Atlas and that is also sufficient to take this case out of the *Copperweld* rule." While *Rothery* dealt with the common carriage of goods, not the hospital marketplace, the court clearly indicated that the specific facts of the situation controlled, and cited as authority this court's decision in *National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85 (1984). The horizontal restraint between competitor university members of the NCAA took the case out of the *Copperweld* doctrine. (792 F.2d 214-15).

In its *Pudlo* decision the Seventh Circuit joined the Fourth Circuit in *Oksanen v. Page Memorial Hospital*, 945 F.2d 696 (4th Cir. 1991), cert. denied, 112 S.Ct. 873, 117 L.Ed.2d 137 (1992) holding that a hospital is incapable of conspiring with its medical staff during the peer-review process. However, in *Oksanen* the Fourth Circuit was presented with unusual and unique facts, since the disciplinary action was initiated by the hospital's board and not the physician's competitors after complaints came from many sources. Moreover, fair procedures were observed and any competitor's impact on those procedures was minimal. 945 F.2d 705-707. The reality is that the Fourth Circuit engaged in a practical construction and application of HCQIA which, as the court noted, did not

apply. 945 F.2d at 704. n.2.[2] Moreover, the Fourth Circuit held: "While the members of a medical staff may have the capacity to conspire among themselves, such a conspiracy did not occur in this case." 945 F.2d at 699. The Seventh Circuit's decision goes further than the Fourth Circuit's decision.

Had the Fourth Circuit in *Oksanen* fully analyzed and understood the clear warning from this Court in *Patrick v. Burget*, (a case the Fourth Circuit fails to even cite), the Fourth Circuit would have granted only limited immunity.[3] If the Health Care Quality Improvement Act of 1986 (42 U.S.C. sec. 11101 et seq.) "provides in sufficient immunity to protect the peer-review process fully, [physicians] . . . must take the matter up with Congress." 486 U.S. at 105 n.8. Dr. Pudlo would suggest that the Fourth Circuit in *Oksanen* was moved by the appropriateness of the peer review procedures actually employed (which stand in stark contrast to those Dr. Pudlo alleges in his

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[2] "The Congress further noted that '[t]here is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review' 42 U.S.C. § 11101(4) & (5). This legislation, however is not controlling in this litigation which concerns events accruing before the Act's effective date." 945 F.2d at 704, n.2.

[3] "Congress in fact insulated certain medical peer-review activities from antitrust liability in the Health Care Quality Improvement Act of 1986, 42 U.S.C. 11112(a). . . . In enacting this measure, Congress clearly noted and responded to the concern that the possibility of antitrust liability will discourage effective peer review. If physicians believe that the Act provides insufficient immunity to protect the peer-review process fully, they *must* [emph. added] take that matter up with Congress." *Patrick v. Burget*, 486 U.S. at 105, n.8.

case) and was unaware of the full measure of public policies involved but acted in a misguided desire to further shield peer review process. The Fourth Circuit then embarked on an ill-advised journey of blanket immunity. The Seventh Circuit in Pudlo completed the journey by reaching a conclusion of law that suffocates competition among physicians. Indeed, the Seventh Circuit's decision would provide a *How to Do it Manual* for anti-trust conspirators.

II. THIS COURT'S DECISION OF PATRICK V. BURGET HAS BEEN RENDERED MOOT BY THE SEVENTH CIRCUIT'S DECISION REGARDING DR. PUDLO; SUCH AN IMPORTANT RULING OF LAW DESERVES THE ATTENTION OF THIS COURT

The District Court in *Pudlo* failed to adequately appreciate that the Medical Staff is not a "wholly owned entity of the Hospital" and established a policy of *per se* exemption for the health care industry, a policy adopted by the Seventh Circuit. However, this Court declined to adopt exactly such a policy in *Patrick v. Burget*, under the rubric of state action and referred the matter to Congress should additional corrective action be needed. The Seventh Circuit's decision in *Pudlo* does not even require the hospital to actively supervise physician controlled peer review processes (for example by making certain that competitor physicians cannot exercise improper influence on the process) but permits the hospital to rubber stamp kangaroo court processes that do not (and need not) accord with the elementary requirements of HCQIA (including such matters as the notice of specific charges).

This Court repudiated such wholesale exemption from the antitrust laws in *Patrick v. Burget*. The question of whether the Seventh Circuit is correct in adopting such a radical policy break is such an important one that it deserves this court's attention. At a bare minimum, an active supervision policy should be applied to ensure that peer review does not conceal cloakroom antitrust conspiracies. [Indeed, as both government and the private sector impose more economic pressure upon physicians and hospitals to control health care costs, an ironic response by many physicians seeking to maintain their existing income levels may be to increase unfair anti-competitive efforts using peer review as a weapon.]

III. CONGRESS HAS REJECTED EXTENSION OF IMMUNITIES

In *Patrick* this Court referred any request for additional immunities to Congress, which indeed acted the following year by enactment of the Omnibus Budget Reconciliation Act of 1989 which required the General Accounting Office to study and report on physician antitrust issues. The report issued in 1991, *Physician Antitrust Issues-GAO Views;* ¶ 50,062 Trade Regulation Reports 48,714; stated:

> "Hospital peer review is subject to Anti-Trust scrutiny but is likely to violate the law only when the process is abused. . . . Thus, medical staff of a hospital may engage in peer review without undue antitrust exposure by establishing procedures to ensure that medical peer review activities are conducted in good faith with safeguards for the rights of those subject to

> review and competitors of the doctors under review do not wield the ultimate power. . . . " 48,717.
>
> In conclusion the GAO Report states: "However, the antitrust laws should not unduly interfere with responsible actions by physicians or payers to achieve either end. *Moreover, the risk of anti-competitive effects should be considered before deciding that a further legislative exemption from antitrust scrutiny is warranted. Hospital-based peer review is already exempt to a large extent.*" [emph. added] Id. 48,722

Congress has not acted to further extend immunities since the receipt of the report.

Congress has ratified by its actions the decision of this court in *Patrick* to permit federal antitrust oversight to continue. Both Congress's actions (by enacting HCQIA) as well as by commission of a study and subsequent inaction ratify the view that the Sherman Act remains needed to ensure that hospital staff's delegated powers are not being abused at the expense of competitors and consumers. Congress has explicitly recognized that the peer review process remains potentially tainted by the medical staff's inherent conflict of economic interests.

For example, in the case at bar, the decision of the Seventh Circuit ignored well-pleaded allegations that the Executive Committee of the hospital, numerical composition notwithstanding, had four members who were Plaintiff's direct competitors. (AC¶¶ 23&33) The complaint alleged that the Executive Committee defers its decisions to the decisions of the specialists in the field of

review.(AC¶ 23) Therefore, Plaintiff sufficiently alleged that the four competitors on the Executive Committee infected the decision making process. This clear set of allegations address directly the fear that Congress recognized as legitimate in its enactment of HCQIA in 1986 – a peer review process can be abused. Dr. Pudlo alleged that the dynamics of decision making on the Medical Executive Committee was such that his competitors argued and voted for the object of their plot with no opportunity to Dr. Pudlo to present his case. *This vote took place before the Medical Executive Committee received the complete hearing committee report which vindicated Dr. Pudlo entirely.* To expect that the Hospital Governing Board, a body of non-physicians, will exercise independent control in such a situation blinks reality.

The United States Court of Appeals for the Seventh Circuit should not be permitted to off-handedly dismiss well-pleaded facts and interpret the circumstances of the case just to buttress a novel theory of law. Such a practice is not supported by the authorities of this Court. *Conley v. Gibson,* 355 U.S. 41, 45-48 (1957).

On the motion to dismiss the court must construe all facts in light most favorable to the Plaintiff. *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 473 (1962). The Seventh Circuit both ignored the pleading and arguments presented to it, and drew conclusions supported neither by law nor by common sense. Any decision to close federal courthouses to such action should only be made by Congress.

IV. ANTITRUST AGENCIES HAVE FOUND ABUSES BY PHYSICIANS SEEKING TO CONTROL HOSPITAL DECISIONS; ANTITRUST ENFORCEMENT IS STRONGLY FAVORED BOTH BY FEDERAL AND STATE AGENCIES AND BY PRIVATE ANTI-TRUST LITIGANTS

Recent actions by the Federal Trade Commission which resulted in settlements demonstrate that the possibility of hospital "capture" by medical staff physicians are not illusory but unfortunately all too real in the health care marketplace. In both cases threatened boycotts by the Medical Staff of two Fort Lauderdale, Florida, hospitals were enjoined, boycotts that had been aimed at coercing Hospital Boards not to accept the lower priced competitors from the Cleveland Clinic. *Medical Staff of Holy Cross Hospital, C-3345, and Medical Staff of Broward General Medical Center C-3344, 56 Fed. Reg. p.49,184, No. 188(Sept. 27, 1991), Diran Seropian M.D. Dkt. No 9248, 57 Fed. Reg. 44,748, No. 189 (Sept. 29, 1992) (consent orders)* Such cases demonstrate the hospital's inability (unaided by antitrust law) to control anti-competitive Medical Staff behavior, and demonstrate the utility of federal antitrust supervision. [The Senate Finance Committee heard testimony from Hillary Clinton on September 30, 1993, chairwoman of the Presidential Task Force on Health Care Reform: "Health Care System in this country stifles competition".]

On May 7, 1993, the Senate Committee on Finance, Subcommittee on Medicare and Long-term Care heard the testimony by two enforcers of antitrust laws who strongly supported continued antitrust oversight over the health care delivery system. They stated: "[A]ny decision

to abandon competitive principles should be the decision of the State governments." Trade Regulation Reporter ¶ 50,104 at 48,900. Ms. Ellen Cooper, Chief of the Antitrust Division of the Maryland Attorney General's Office, also a Chairperson of the Health Care Working Group of the National Association of Attorney's General.

"[A]ntitrust enforcement has been and will continue to be an important factor in allowing for the development of a more cost-effective health care delivery system. . . . " Mr. James C. Egan, Director for Litigation for the FTC's Bureau of Competition, *Id.* ¶ 50,105 at 48,904.

Cartels of physicians with the power to admit or not to admit the patients to a given hospital make the Hospital Board as a matter of "practical economics" without power to control them. See, Kissam et al., *Antitrust and Hospital Privileges: Testing the Conventional Wisdom,* 70 Cal.L.Rev. 595, 605-613 (1982).

Professor Areeda has also recognized the possibility that Hospitals may be coerced to adopt decisions of the Medical staff members. "The illegal conspiracy among the doctors . . . did not lie in their recommendations but apparently in their collective coercion of the hospital." Areeda, *Antitrust Law,* at 301 ¶ 1471h. (discussing *Weiss*)

V. THIS COURT HAS CONSISTENTLY HELD THAT SHERMAN ACT § 1 MUST BE ENFORCED EVEN WHEN A SINGLE COMPETITOR IS INVOLVED

The very existence of the combination of physician competitors, in a joint venture with a hospital empowered to decide the fate of other physicians, is an

appropriate issue for Federal antitrust scrutiny. This court has frequently considered the effects of action taken against a single individual plaintiff. Consumers may have much more at stake in cases of this kind than their interest in the fate of many other competitors whose presence or absence from the market may be more obvious.

Dr. Pudlo alleges he was unjustly and unfairly victimized by his competitors and competition was thereby injured. His case is just as worthy of this Court's attention as was a retailer's from San Francisco, *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), a surgeon's from Astoria, Oregon, *Patrick supra* and an ophthalmologist's from Los Angeles, *Summit Health Ltd. v. Pinhas*, ___ U.S. ___, 111 S.Ct. 1842 (1991). This court has frequently protected competition through application of § 1 of the Sherman Act. No competitor is too small or too unimportant to be reached by § 1, although examination of the economic facts and the substance of the controversy underpin antitrust jurisprudence.

In *Klor's Inc. supra*, the Plaintiff's insignificance and failure to allege any general "public harm" were no bar to finding that a substantive violation had been sufficiently alleged. The Court stated that a group boycott "is not to be tolerated merely because the victim is just one merchant, whose business is so small that his destruction makes little difference to the economy" *Id.* at 213. The point is well taken, not because antitrust law is designed to protect small business, but because true group boycotts of the kind alleged in *Klor's* are naked restraints that deprive "the marketplace of the independent centers of decision making that competition assumes and

demands." *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752, 769 (1984). The potential harm to competition that exists whenever horizontal competitors repeatedly make decisions affecting the fate of other competitors, should be considered in any case brought by an individual victim. *Pinhas supra.* Special opportunities for abuse arise when combinations of physicians exercise *de facto* control over professional practice. This Court pointed out that a self regulated industry must adhere to fair procedure to ferret out anticompetitive practices or else be subjected to very strict antitrust scrutiny. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) A medical staff, left free by a hospital to pursue its members' collective interest, should not have its actions immunized from antitrust scrutiny just because they affect only one competitor at a time. Havighurst, "Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships," 1984 Duke L.J. 1074, at 1142-44.

VI. THE QUESTION OF WHETHER THE HOSPITAL MAY BE VICARIOUSLY LIABLE FOR AN ABERRANT PEER REVIEW PROCESS, WHEN THE HOSPITAL HAS BEEN PROPERLY PUT ON NOTICE, IS AN IMPORTANT QUESTION OF LAW

The decision of the Seventh Circuit court implicitly holding that vicarious liability is not applicable also establishes an important rule of law deserving of this court's attention. The District Court in *Pudlo* reasoned that the conspiracy of the individual competitors is not actionable since the ultimate authority for this decision is retained by the Hospital Board. That part of the decision

was not supported by the Sixth Circuit's decision of *Nurse Midwifery Associates v. Hibbett*, 918 F.2d 605, 614-15, as modified, 927 F.2d 904 (6th Cir. 1990), *cert. denied*, 112 S.Ct. 406 (1991).

In *American Society of Mechanical Engineers Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) this Court stated that the principal is vicariously liable for the acts of its agents. Vicarious liability turns on the degree of control and not mere authority for the decision. "The anticompetitive practices of ASME's agents are repugnant to the antitrust laws . . . and ASME should be encouraged to eliminate the anticompetitive practices of all its agents acting with apparent authority, especially those who use their positions in ASME solely for their own benefit." *Id.* at 574. The importance of *actual* exercise of control in eliminating the antitrust violation has been eloquently stated by Professor Areeda:

> "[T]he disloyalty may be rather modest from the employer's viewpoint and still cause a significant restraint on competition. The employer's own interest may be affected *so little by the disloyalty that he has little incentive to bear the monitoring costs of preventing it.* Or he may be an inefficient manager. Or the disloyalty may be successfully hidden from him. An antitrust remedy may bring the facts to light, encourage supervision, and compensate the plaintiff for injuries caused by the employer's anticompetitive behavior." Areeda, Antitrust Law, Vol. VII, (1986) ¶ 1471d2, at 292.

> "Causation is clearly absent where the firm's decision is ultimately made *de novo* by a superior official. . . . Formal position is not determinative. A particular member may have a disproportionate effect on the dynamics of a

committee. Superior officials may automatically adopt lower level recommendations or may be misled by the way data or arguments are presented." *Id.* ¶ 1471G. AT 299.

Compare, *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022 (9th Cir. 1988), *cert. denied*, 493 U.S. 846 (1989) (physician controlled health care plans could have an impermissible effect on competition). Accord, *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (Health care plans may reimburse members and nonmembers differently, both in price and manner, so long as physicians do not control the health care plan.) See also, *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pa.*, 745 F.2d 248 (3rd Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) (effective control of plan by dentists not shown); *Royal Drug Co. v. Group Life and Health Ins.*, 737 F.2d 1433, 1436-37 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) (same); *Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 480-81 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (challenged plans were mere "agents of their member physicains" and were in substance combinations of physicians).

Such cases illustrate that under the Sherman Act § 1, courts will carefully examine arrangements in which groups of physicians have the theoretical or actual ability to control the terms on which they compete. In cases where physicians are *de facto* decision makers of what otherwise seems to be an independent entity, such precedents authorize piercing the formal structure to find the requisite prohibited conduct when physicians are in fact "calling the shots." There is no reason to treat hospitals any differently if they permit their decisions regarding

medical staff privileges to be effectively controlled by an anticompetitive cartel of interested physicians.

CONCLUSION

Claims by hospitals and physicians that the threat of antitrust suits deters responsible peer review and quality assurance in hospitals need not be taken seriously, because a hospital and its medical staff can escape close antitrust scrutiny of their peer review activities by not permitting the competitors to sit in judgement and following a fair procedure and so take advantage of limited immunity granted by Congress.

> "Over the past several years medical costs have increased at a rate far in excess of inflation. . . . In situations where health care providers violate antitrust laws, these increases are needlessly exacerbated. It is in everyone's interest to have medical costs include only those costs appropriate under the law." *Wei v. Bodner*, 127 F.R.D. 91 at 95 (D.N.J. 1989).

The facts of this case lend themselves to this Court's ability to resolve the conflict among the Circuits, to affirm the reasoning of *Patrick* and reject the new immunity so as to finally and firmly direct the industry to avail themselves to the limited immunities as set out by Congress in HCQIA.[4]

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[4] Bloomstein & Sloan, *Antitrust and Hospital Peer Review*, 51 Law and Contemporary Problems, 7, at 92: HCQIA calls for peer review by persons, "not in direct competition with the physician involved. That type of requirement would go far in reducing the

At the same time the lower courts should be directed to summarily dismiss antitrust complaints where the immunities have been complied with, but on the other hand federal courts should not be closed to the victims of antitrust abuses.

If the hospital and its medical staff are legally incapable of conspiring among themselves, then the physicians' competitors who abuse peer review process should be subjected to clear risk of antitrust liability. The hospitals, nevertheless, should be found vicariously liable for the anti-competitive conduct of their authorized agents.

For the reasons stated, the petitioner respectfully prays this Court to grant a writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit and resolve the important questions presented regarding one of the most significant sectors of the United States economy.

Respectfully submitted,

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control of staff physicians on the hospital staff decisions. . . . [Y]et it would preserve the quality assurance function performed by peer (but not competitive) physicians." *See also,* Havighurst, *Professional Peer Review and the Antitrust Laws,* 36 Case Western L. Rev. 1117 (1986).

Joseph PUDLO, M.D., Plaintiff,

v.

E. ADAMSKI, M.D., Jr., J. Schneider, M.D., S. Borushek, M.D., J. Daddino, M.D., Gary Fahrenbach, M.D., D. Larson, M.D., B. Levy, M.D., J. Nabolotny, M.D., L. Pankau, M.D., V. Vohra, M.D., Individually, T.P. Nassos, M.D., E.W. Beutel, M.D., Y. Kim, M.D., J. Coughlin, M.D., W. Davidson, M.D., F. Grabiner, M.D., S. Hadawi, M.D., F. Mariano, M.D., D.L. Meyers, M.D., E.A. Petrus, M.D., L. Pupillo, M.D., F. Healey, M.D., A.R. McCall, M.D., J. Schneider, M.D., Sister Donna Maria, Chief Executive Officer of the Hospital, in their representative capacity and Resurrection Medical Center, in Chicago, Illinois, Defendants.

No. 91 C 7474.

United States District Court,
N.D. Illinois, E.D.

March 16, 1992.

MEMORANDUM OPINION
AND ORDER

ASPEN, District Judge:

This antitrust action arises out of plaintiff's termination from his medical staff membership at defendant Resurrection Medical Center (hereinafter "Hospital"). Plaintiff Joseph Pudlo, M.D., brings this five-count amended complaint against the Hospital, ten rival internists, sixteen members of the Hospital's Executive Committee and Sister Donna Marie, Chief Executive Officer and member of the Governing Board of the Hospital, alleging violations of §§ 1 & 2 of the Sherman Act (Counts I-III), tortious interference with a business relationship (Count IV) and breach of contract (Count V). Presently

before the court is defendants' motion to dismiss Pudlo's amended-complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated below, we grant the motion.

I. Background[1]

Pudlo, an internist, purchased a primary care practice from Dr. Leo Stolarski on August 1, 1990. Stolarski had used the defendant Hospital as the exclusive facility to admit his patients for more than thirty years. Pudlo obtained a provisional medical staff membership with privileges in the Department of Internal Medicine at the Hospital. His practice with the Hospital began on August 1, 1990 and continued until November 18, 1991, during which time he treated more than 300 patients.

The difficulties between Pudlo and the defendants began in mid-June, 1991. At this time, defendant Dr. E. Adamski, Chairman of the Department of Internal Medicine and member of the Executive Committee of the Hospital, advised Pudlo that the Internal Medicine Committee was in the process of reviewing the quality of care given to one of his patients. Adamski further stated that unless Pudlo explain certain deficiencies in this case, Pudlo's practice "may be in jeopardy." Several days later,

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[1] Of course, as with all motions to dismiss, we take the "well-pleaded allegations of the complaint as true and view them, as well as reasonable inferences therefrom, in the light most favorable to the plaintiff." *Balabanos v. North Am. Inv. Group, Ltd.*, 708 F.Supp. 1488, 1491 n. 1 (N.D.Ill.1988) (citing *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir.1985), *cert. denied*, 475 U.S. 1047, 106 S.Ct. 1265, 89 L.Ed.2d 574 (1986)).

Pudlo received a letter from Adamski, dated June 17, 1991, detailing the issues raised by the Internal Medicine Committee and demanding a written response prior to the Committee's July meeting.

In an effort to comply with the June 17, 1991 letter, Pudlo requested the patient's records from the Medical Records Department at the Hospital. However, the Medical Records Department refused Pudlo's request, informing him that the case records were being reviewed by the Quality Assurance Committee. On July 17, 1991, Pudlo received a registered letter from Adamski indicating that the Internal Medicine Committee had not obtained a response to the June 17, 1991 letter and that a failure to respond may jeopardize his staff appointment. That same date, Pudlo received yet another letter from Adamski, stating that the Committee found several deficiencies in the medical record of an additional patient.

Pudlo responded with a letter addressed to Adamski, dated August 1, 1991, in which he described his understanding of the history of the patients' cases. This letter was sent prior to the next regularly scheduled meeting of the Department of Internal Medicine – August 9, 1991. Rather than waiting until the August meeting to address the issue, Adamski met with several unidentified internists on July 31, 1991. Pudlo contends that during this meeting, the physicians "discussed and agreed upon ways to exclude Plaintiff from the Hospital."

By means of a certified letter dated July 31, 1991, Adamski asked Pudlo to attend the August 9, 1991 meeting of the Internal Medicine Committee. During the course of that meeting, Pudlo learned that four additional

cases of his were under review. Without prior notice of the identity of medical records to be reviewed, Pudlo was unprepared to answer questions respecting these cases. Following the meeting, the members of the Committee recommended to the Executive Committee termination of Pudlo's medical staff appointment.

The Executive Committee is comprised of sixteen physicians at the Hospital, four of whom practice in the Department of Internal Medicine. According to Pudlo, other members of the Executive Committee generally follow the recommendations of the members who practice in the same area as the physician under review. Here, the Executive Committee recommended to the Hospital's Governing Board that Pudlo not be removed from his provision status, resulting in his automatic termination from his staff appointment. On September 13, 1991, via certified letter, Sister Donna Marie, Chief Executive Officer and member of the Hospital's Governing Board, advised Pudlo that his medical staff appointment had been terminated by action of the Governing Board.

Pursuant to the Medical Staff Bylaws, Pudlo requested a hearing before the Appeals Committee, and one was scheduled for October 9, 1991. Adamski, the first witness to testify, addressed Pudlo's deviations of care in those cases reviewed by the Internal Medicine Committee. Contending that Adamski's testimony was vague, Pudlo's attorney moved for a directed verdict, but was denied. Additionally, Pudlo's attorney requested the opportunity to cross-examine Adamski. Faced with Adamski's threats to leave the hearing, the Committee denied the request. After the conclusion of Adamski's testimony, Pudlo was questioned by various members of

the Committee. On his own behalf, Pudlo presented the testimony of Dr. Elliot Kroger, an expert witness. The Medical Staff Bylaws compel the Appeals Committee to send Pudlo, via certified mail, a copy of its findings within twenty days of the hearing. Pudlo did not receive such a report.

The results of the appeal were reviewed by the Executive Committee at its November 6, 1991 meeting. Finding the Appeals Committee's report incomplete, the Executive Committee requested a more detailed report from Dr. Gorny, the Chairman of the Appeals Committee. Nonetheless, at that very meeting, the Executive Committee recommended termination of Pudlo's staff appointment. Pudlo sought a stay of the Executive Committee's decision, pending the more detailed report to be filed by the Appeals Committee. Both Appeals Committee reports unanimously recommended that Pudlo should be removed from provisional status (*i.e.*, continuing his medical staff membership). Despite the favorable reports from the Appeals Committee and Pudlo's attempts to petition the individual members of the Governing Board, the Board terminated his medical staff appointment.

II. Section 1 Claims (Counts I & II)

In order to state a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, a plaintiff must plead the existence of an agreement in the form of a contract, combination or conspiracy that imposes an unreasonable restraint on trade. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723, 108 S.Ct. 1515, 1519, 99 L.Ed.2d 808 (1988); *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549,

554-55 (7th Cir. 1980).[2] Thus, in the context of a medical staff privilege case, a plaintiff initially must allege that the revocation of his privileges was a result of an agreement between two or more separate entities. A liberal reading of Pudlo's amended complaint reveals two theories of conspiracy culminating in the termination of his medical staff appointment: (1) that the Hospital conspired with the members of its medical staff; and (2) that individual members of the Hospital's medical staff conspired among themselves.

Relying on the doctrine of intracorporate immunity, expounded in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), defendants argue that neither of the alleged conspiracies detailed in Pudlo's amended complaint is cognizable under Section 1 of the Sherman Act. *Copperweld* is widely cited for the following propositions: (1) an agreement between a parent corporation and its wholly-owned subsidiary is not a concerted action for purposes of Section 1;

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[2] As a jurisdictional prerequisite to any action brought under § 1 of the Sherman Act, a plaintiff must allege that the potential injury will affect interstate commerce. *See Summit Health, Ltd. v. Pinhas*, ___ U.S. ___, 111 S.Ct. 1842, 1847, 114 L.Ed.2d 366 (1991). In the instant case, Pudlo notes that the Hospital purchases medical supplies and equipment and receives insurance revenues from out-of-state sources. Further, Pudlo alleges that, given its close proximity to O'Hare International Airport, the Hospital served non-Illinois patients. Finally, Pudlo argues that the termination has diminished his ability to obtain a staff membership at any hospital in the United States. Given the Supreme Court's recent holding in *Pinhas*, we believe the above allegations meet the jurisdictional requirement for an antitrust action.

(2) an agreement between officers or employees of the same firm does not ordinarily constitute a Section 1 conspiracy; and (3) a corporation is legally incapable of conspiring with its agents or employees. *See id.* at 769, 104 S.Ct. at 2740-41. The driving force behind these principles is that "officers of a single firm are not separate economic actors pursuing separate economic interests." *Id.* Indeed, "[c]oordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively." *Id.*

The question of whether a hospital is legally capable of conspiring with its medical staff appears to be an issue of first impression within this circuit. Several other circuits, however, have considered the issue, rendering polarized opinions. *Compare Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 702-05 (4th Cir.1991) (hospital incapable of conspiring with its medical staff during the peer-review process), *cert. denied*, ___ U.S. ___, 112 S.Ct. 973, 117 L.Ed.2d 137 (1992) *and Nurse Midwifery Assoc. v. Hibbett*, 918 F.2d 605, 614 (6th Cir.1990) ("intracorporate conspiracy doctrine prevents a finding of conspiracy between a hospital and its medical staff"), *cert. denied*, ___ U.S. ___, 112 S.Ct. 406, 116 L.Ed.2d 355 (1991) *and Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96, 118 (3d Cir.1988) ("a hospital could *not* conspire with its medical staff, as an entity") (emphasis in original), *cert. denied*, 489 U.S. 1078, 109 S.Ct. 1528, 103 L.Ed.2d 834 (1989) *and Weiss v. York Hosp.*, 745 F.2d 786, 814 (3d Cir.1984) ("hospital cannot legally conspire with its medical staff"), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985) *with Oltz v. St. Peter's Community*

Hosp., 861 F.2d 1440, 1450 (9th Cir.1988) (rejecting the analogy to the intracorporate immunity doctrine) *and Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1280 (11th Cir. 1988) (same), *cert. denied*, 495 U.S. 924, 110 S.Ct.1960, 109 L.Ed.2d 322 (1990).

Whether the medical staff's relationship to the Hospital is sufficiently analogous to an officer's relationship to the corporation involves an inquiry of "substance, rather than form." *Oksanen, 945 F.2d at 703.* Thus, a mere finding that the Hospital's medical staff *sometimes* pursues economic interests apart from the Hospital is inadequate to conclude that the Hospital is *always* capable of conspiring with its medical staff. *See id.* (criticizing the *Bolt* court for ignoring the functional approach mandated by *Copperweld*). Rather, we must examine the substance, rather than form, of the Hospital's relationship with its medical staff within the specific context of the peer-review process.

Most significant to the present inquiry is the fact that the Hospital's Governing Board delegated peer-review decisionmaking in the first instance to the medical staff. In accordance with the Hospital's bylaws, Dr. Adamski, Chairman of the Department of Internal Medicine, solicited information from other internists affiliated with the Hospital in order to make his mandatory recommendation to the Executive Committee concerning whether to remove Pudlo from provisional status. *See* Bylaws art. III, §§ 4-5. This participation cannot be characterized as conduct adverse to the Hospital. To the contrary, the medical staff functioned as an integral component of the Hospital's management structure, utilizing its expertise in medical care to make an initial determination of whether

Pudlo had achieved a certain level of professional competence. Further, to the extent that individual members of the medical staff may opt to pursue interests that are antithetic to those of the Hospital, the Governing Board is not bound by the determination of the medical staff. Indeed, the bylaws, in accord with state law, specifically vest the Governing Board with the ultimate authority over peer-review decisions: "The Governing Body is responsible for the final decision, based on medical staff recommendations, regarding an individual's reappointment and/or renewal or revision of individual clinical privileges." Bylaws art. III, § 4. Given the nature of this delegated authority – authority present in *Oksanen* and absent in *Oltz* – we are compelled to conclude that, with regard to Pudlo's termination, the medical staff acted as an officer of a corporation would in relation to the corporation. Accordingly, we recognize the applicability of the intracorporate immunity doctrine to peer-review proceedings (*i.e.*, the Hospital is legally incapable of conspiring with its medical staff during the peer-review process).

The question of whether members of the medical staff are capable of conspiring among themselves during the peer-review process is a different matter. We recognize that the members of the Hospital's medical staff often are driven by competing economic interests. Consequently, "when these actors join together to take action among themselves, they are unlike a single entity and therefore they have the capacity to conspire as a matter of law." *Oksanen*, 945 F.2d at 706 (citing *Nurse Midwifery*, 918 F.2d at 614); *see also Weiss*, 745 F.2d at 814. Nonetheless, this theory of Section 1 conspiracy is not actionable. As a general prerequisite to the maintenance of a private cause

of action under the antitrust laws, a plaintiff must allege "antitrust injury," which is to say "injury of the type that the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S.Ct. 1884, 1889, 109 L.Ed.2d 333 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113, 107 S.Ct. 484, 491, 93 L.Ed.2d 427 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).[3] As discussed above, the Hospital's Governing Board retained ultimate responsibility for the decision of whether Pudlo's staff appointment would be terminated. Thus, it is inconceivable a conspiracy among individual members of the medical staff was the actual cause of Pudlo's injury. *See Oksanen*, 945 F.2d at 706 ("To speak of a conspiracy among a medical staff during the

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[3] We note that this requirement, akin to that of standing, is distinct from whether a restraint is "unreasonable" under Section 1 of the Sherman Act. As stated in *Atlantic Richfield*, 110 S.Ct. at 1893:

> We also reject respondent's suggestion that no antitrust injury need be shown where a *per se* violation is involved. The *per se* rule is a method of determining whether § 1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover . . . under . . . the Clayton Act. *Per se* and rule-of-reason analysis are but two methods of determining whether a restraint is "unreasonable," *i.e.*, whether its anticompetitive effects outweigh its procompetitive effects. . . . The purpose of the antitrust injury requirement is different. It ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place.

peer review process is not very meaningful in antitrust terms if the staff lacks the final authority to implement any agreement that it does reach."). Accordingly, even if Pudlo has alleged facts sufficient to establish a conspiracy among the medical staff, no actual injury could flow from the resulting agreement.

In sum, as neither of Pudlo's theories of Section 1 conspiracy is cognizable, we dismiss Counts I and II of his amended-complaint.

III. Section 2 Claims (Count III)

In Count III of his amended complaint, Pudlo asserts that "defendants have been engaged in unlawful combination and conspiracy to monopolize trade and commerce in the provision of general internal medicine services in violation of Section 2 of the Sherman Act." Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in relevant part: "[e]very person who shall . . . combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . . " Pudlo's Section 2 claim, which attempts to allege a "conspiracy to monopolize," merits little discussion. As we have previously concluded that the Hospital is legally incapable of conspiring with its medical staff under Section 1, they similarly lack the capacity to conspire under Section 2. *Oksanen*, 945 F.2d at 710. Respecting Pudlo's claim of a conspiracy among the medical staff itself, to the extent that such a conspiracy existed, no actual injury could conceivably flow from the ensuing

agreement. Accordingly, Pudlo's Section 2 claim must fall.

IV. State-Law Claims (Counts IV & V)

In light of our disposition of Pudlo's federal claims, we pause to evaluate the necessity of exercising supplemental jurisdiction over Pudlo's state-law claims, *i.e.*, tortious interference with a business relationship (Count IV) and breach of contract (Count V). As a general rule, "[w]hen the federal claims are disposed of before trial, the state claims should be dismissed without prejudice almost as a matter of course." *Olive Can Co. v. Martin*, 906 F.2d 1147, 1153 (7th Cir.1990) (citing *Baltimore Orioles, Inc. v. Major League Baseball Players Assoc.*, 805, F.2d 663, 682 (7th Cir.1986), *cert. denied*, 480 U.S. 941, 107 S.Ct. 1593, 94 L.Ed.2d 782 (1987)). Notwithstanding his strained appeal to general notions of judicial economy, convenience and fairness to litigants, Pudlo has failed to present any extraordinary circumstances justifying retention of jurisdiction over these claims, and they are dismissed.

V. Conclusion

In support of his claims under Section 1 & 2 of the Sherman Act, Pudlo relies on two possible conspiracy patterns: (1) that the Hospital conspired with its medical staff; and (2) that the individual members of the medical staff conspired among themselves. Neither of these theories, however, are cognizable under the antitrust laws. First, under the doctrine of intracorporate immunity, a hospital is legally incapable of conspiring with its medical staff during the peer-review process. Second,

although the medical staff is legally capable of conspiring among itself, no actual injury could possibly flow from the resulting agreement. Accordingly, we dismiss Counts I-III of Pudlo's amended-complaint. Further, Counts IV and V are dismissed for lack of supplemental jurisdiction. It is so ordered.

(To be reported at: 2 F.3d 1153 (Table))
62 USLW 2151
UNPUBLISHED DISPOSITION

Joseph PUDLO, M.D., Plaintiff-Appellant,

v.

E. ADAMSKI, Jr., M.D., J. Schneider, M.D.,
S. Borushek, M.D., et al.,
Defendants-Appellees.
No. 92-1854.
United States Court of Appeals, Seventh Circuit.
Argued Jan. 14, 1993.
Decided Aug. 9, 1993.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, 91 C 7474; Marvin E. Aspen, Judge.

N.D.Ill.

AFFIRMED.

Before COFFEY, and KANNE, Circuit Judges, and ESCHBACH, Senior Circuit Judge.

ORDER

Joseph Pudlo, M.D. ("Pudlo") is appealing the district court's dismissal of all five counts of his amended complaint. Pudlo purchased a medical practice and obtained provisional medical staff privileges at Resurrection Medical Center (the "Hospital"). The Hospital's Quality Assurance and Risk Management Department, which reviews patient charts to detect deviations from quality standards, forwarded the chart of one of Pudlo's patients to the Hospital's Internal Medicine Committee. As a result, the Internal Medicine Committee began a

review of the care given to that patient. This review ultimately expanded to include six of Pudlo's patients. The Internal Medicine Committee ultimately recommended that Pudlo's provisional staff privileges not be extended, automatically terminating Pudlo's staff privileges at the Hospital. The Internal Medicine Committee's recommendation was forwarded to the Hospital's Executive Committee, made up of 16 doctors, which approved the recommendation. Finally, the recommendation reached the Hospital's Governing Board (the "Board"), which decided to proceed with the termination of Pudlo's staff privileges. Pudlo appealed to the Hospital's Appeals Committee, which recommended that he retain his staff privileges, but the Board, which had final authority, did not relent. After the termination of his staff privileges, Pudlo filed a complaint containing five counts: Counts I and II asserted claims under s 1 of the Sherman Act; Count III asserted a claim under s 2 of the Sherman Act; and Counts IV and V asserted pendent state law claims for tortious interference with contract and breach of contract, respectively.

The defendants moved for dismissal of Pudlo's claims under Fed.R.Civ.P. [PAGE 2] 12(b)(6). The district court dismissed all five counts of the complaint, rejecting the Sherman Act claims on the merits and the state claims for lack of supplemental jurisdiction.[1] Our review of the briefs and the record leads us to conclude that the district

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[1] Our reading of the district court's opinion makes it clear that the court dismissed Pudlo's state claims without prejudice, declining to exercise pendent jurisdiction because all of Pudlo's federal claims had been dismissed.

court carefully considered all issues when granting defendants' 12(b)(6) motion. We affirm for the reasons stated in the district court's thorough opinion, which may be found at 789 F.Supp. 247.

We write separately only to note our agreement with the position taken by the Third and Fourth Circuits that under the doctrine of intracorporate immunity, a hospital is legally incapable of conspiring with its medical staff during the peer-review process, when, as here, the medical staff acts with delegated authority to recommend action to the hospital's board, because the staff is acting in the same way that an officer of a corporation would act in relation to the corporation.[2] For this reason and the

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[2] Oksanen v. Page Memorial Hosp., 945 F.2d 696, 702-05 (4th Cir.1991) (in banc), cert. denied, 112 S.Ct. 973 (1992) (holding that a hospital is incapable of conspiring with its medical staff during the peer-review process when the functional relationship between them is analogous to that of corporation and officer); Nanavati v. Burdette Tomlin Memorial Hosp., 857 F.2d 96, 118 (3d Cir.1988), cert. denied, 489 U.S. 1078 (1989) (holding that "a hospital could not conspire with its medical staff, as an entity, because the staff operated as an officer of the corporation would in relation to the corporation") (emphasis in original) (citation and internal quotation marks omitted).
A Sixth Circuit case, Nurse Midwifery Assoc. v. Hibbett, also provides general support for our position, recognizing that during the peer review process, "members of the medical staff were acting as agents of the hospital . . . therefore, the intracorporate conspiracy doctrine is controlling." 918 F.2d 605, 614 (6th Cir.1990), cert. denied, 112 S.Ct. 406 (1991). However, we note that the support is qualified because the Nurse Midwifery court indicated in dicta that it would not apply intracorporate immunity protection when physicians are making staff privilege recommendations concerning a competitor. Id. In the instant case, the initial recommendation was made by Pudlo's direct compet-

other reasons stated in the district court's opinion, the dismissal of Pudlo's complaint is AFFIRMED.[3]

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itors, but the review by the sixteen-member Executive Committee (twelve of whom were not in direct competition with Pudlo) and the fact that final authority was vested in the Hospital's Governing Board removed any possible resulting taint.
The Eleventh Circuit has taken a contrary position. Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810, 819 (11th Cir.), cert. denied, 110 S.Ct. 1960 (1990) (holding that a hospital and the members of its medical staff are legally capable of conspiring with each other in the peer review context). In addition, the Ninth Circuit expressly adopted the reasoning [PAGE 3] of Bolt in a case outside the peer review context. Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1450 (9th Cir.1988) (citing an identical discussion in Bolt v. Halifax Hosp. Medical Center, 851 F.2d 1273, 1280 (11th Cir.1988)). In Oltz, the Ninth Circuit held that anesthesiologists were not acting like officers in relation to a corporation when they pressured the hospital to eliminate a nurse anesthetist as a potential competitor, because their interests were functionally antithetical to the hospital. Id.

[3] On June 22, 1993, Pudlo filed a Motion to File Instanter Citation of Supplemental Authority pursuant to Federal Rule of Appellate Procedure 28(j). On July 2, 1993, the appellees filed an objection to Pudlo's motion. We granted Pudlo's motion and have considered the supplemental authority in rendering this decision.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: August 9, 1993

BEFORE: Honorable John L. Coffey,
Circuit Judge

Honorable Michael S. Kanne,
Circuit Judge

Honorable Jesse E. Eschbach,
Senior Circuit Judge

No. 92-1854

JOSEPH PUDLO, M.D.,
Plaintiff - Appellant

v.

E. ADAMSKI, JR., M.D., J. SCHNEIDER, M.D.,
S. BORUSHER, M.D., et al.,
Defendants - Appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 91 C 7474, Marvin E. Aspen, Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is **AFFIRMED,** with costs, in accordance with the decision of this court entered this date.

(CITE AS: 1992 WL 27002 (N.D.ILL.))

Joseph PUDLO, M.D., Plaintiff,

v.

E. ADAMSKI, M.D., Jr.; J. Schneider, M.D.; J. Daddino, M.D.; Gary Fahrenbach, M.D.; D. Larson, M.D.; B. Levy, M.D.; J. Nabolotny, M.D.; L. Pankau, M.D.; V. Vohra, M.D., Individually T.P. Nassos, M.D.; E.E. Beutel, M.D.; Y. Kim, M.D.; J. Couglin, M.D.; W. Davidson, M.D.; F. Grabiner, M.D.; S. HADAWI, M.D.; F. Mariano, M.D.; D.L. Meyers, M.D.; E.A. Petrus, M.D.; L. Pupillo, M.D., F. Healy, M.D.; A.R. McCall, M.D.; J. Schneider, M.D.; Sister Donna Marie, Chief Executive Officer of the Hospital in their representative capacity and Resurrection Medical Center, in Chicago, Illinois,
Defendant.
No. 91 C 7474.
United States District Court, N.D. Illinois, E.D.
Feb. 12, 1992.

MEMORANDUM OPINION AND ORDER

RONALD A. GUZMAN, United States Magistrate Judge.

Plaintiff Joseph Pudlo has filed an Amended Verified Complaint alleging jurisdiction under Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. sec. 1 et seq. and Section 7 of the Clayton Act, 15 U.S.C. sec. 18. In essence, he alleges that he was denied professional privileges as an M.D. by the defendant, Resurrection Medical Center in Chicago. The case is before this Magistrate Judge on a referral from Judge Aspen to hear and enter a report and recommendation on the plaintiff's motion for preliminary injunction. The parties are now engaged in abbreviated discovery in preparation for the preliminary injunction

hearing. The background facts are as follows. As is the hospital's policy Dr. Pudlo initially enjoyed privileges while on the provisional staff of Resurrection Hospital. After a period of time on the provisional staff the hospital held hearings to determine if he should be removed from the provisional staff to full privileges as a permanent staff member. After a series of hearings, several of which recommended that he not be given permanent staff privileges and one which recommended that he should be given such privileges, the Board of Directors of Resurrection Hospital denied him privileges as a permanent staff member.

Plaintiff now claims that this action was taken not because of any lack of qualifications on his part, but rather to avoid having to compete with him. In December 1991, Pudlo's attorney served a Request to Produce on Resurrection Hospital requesting production of all documents pertaining to the credentials of every member of the Department of Internal Medicine. Such a request, of course, would include notes, documents, and other evidence from the peer review function of all of the members of the Department of Internal Medicine.

The basis for doing so, according to plaintiff, is that these documents might show disparate treatment. That is, that others who were less qualified than he, were granted privilege status while he was not and that this, in turn, could be evidence of an anti-trust conspiracy.

Resurrection Hospital has provided Dr. Pudlo with the complete file of his peer review proceedings, but is refusing to provide the records and files of the peer review proceedings of other physicians. [PAGE 2] Under

Rule 26(b)(1) of the Federal Rules of Civil Procedure, parties may discover any matter not privileged which is relevant to the subject matter in the pending action. Rule 501 of the Federal Rules of Evidence provides that the Federal Common Law of Privilege shall apply in cases based upon a federal cause of action. These two sections therefore mandate that privileged material as defined by the federal common law be protected in federal question cases. See Wm. T. Thompson, Co. v. General Nutrition Corporation, Inc., 671 F.2d 100 (3rd Cir. 1982). Since the complaint alleges a violation of the Sherman Act, 15 U.S.C. Section 1, this is a federal question case. Where, as in the present case, there are both federal and state law questions as well, federal common law of privilege applies. Id. This does not mean however, that the law of the state may not be considered as one of the factors in making the fact intensive determination of whether or not the asserted privilege applies. Memorial Hospital for McHenry County v. Shadur, 660 F.2d 1058, at 1061 (7th Cir. 1981). Where a state provides for a privilege, a strong policy of comity between state and federal sovereignties requires the federal courts to recognize the privilege if this can be done without significant violence to federal substantive and procedure policy. United States v. King, 73 FRD 103, 105 (E.D.N.Y. 1976). To do otherwise would be to subject the citizens of that jurisdiction to a double standard of confidentiality and privacy depending on which court hears a particular case. This result should be avoided if possible. Lora v. Board of Education, 74 FRD 565 (E.D.N.Y. 1977).

Illinois has a law which appears to apply to the present situation. The Illinois Medical Studies Act, Illinois Revised Statutes, Chapter 110, Paragraph 8-201 et seq. (1991) ("Medical Studies Act"). Under this law, documents generated in the course of a hospital's peer review or quality assurance activities are absolutely privileged from discovery in any litigation. The sole exception to this privilege allows a plaintiff seeking the limited judicial review permitted under Illinois Law to access the record of that decision. Id. at P8-2101.

The party asserting the protection of a privilege has the burden of establishing both the existence and applicability of the privilege. Brock v. Gerace, 110 F.R.D. 58 (D.N.J. 1986). Defendant contends that the Illinois Medical Studies Act, Ill. Rev. Stat. ch. 110, provides a privilege that should be applied in this case as a conditional privilege under federal common law. In support of this contention, defendant cites E.E.O.C. v. University of Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983). In that case, the 7th Circuit held that a university need not disclose the identity of participants in the peer review tenure process unless the parties seeking the information demonstrated a substantial, particularized need for the information. The court reasoned that confidential peer review is essential to assure that the decisions with respect to who will and will not be given tenure will be made objectively on the basis of qualifications and that there will be a frank and unrestrained discussion and evaluation of a candidate's academic qualifications. The logic being that if the peers conducting the review have to fear that anything they say will be made public and available to the candidate or others, that they will be more

restrained and less likely or less apt to give their true critical evaluation of the candidate.

It is important to note, as the plaintiff points out in his responsive brief, that the court in the E.E.O.C. v. University of Notre Dame Du Lac case, [PAGE 3] while recognizing a certain qualified privilege, did not preclude production of the records requested by the E.E.O.C., rather it merely held that the identity of persons participating in the peer review process could be withheld. This case was one arising in the context of a racial discrimination allegation by a black professor in the department of economics of that university.

The court imposed upon itself a balancing test in the following manner: "Before determining whether to compel disclosure of materials covered by the qualified privilege, the court must apply a balancing test to determine whether the need of the parties seeking disclosure outweighs the adverse effect such disclosure would have on the policies underlying the privilege. . . . A party must conduct thorough and exhaustive discovery to exploit each and every possible source of information prior to seeking those materials protected by the qualified privilege. 'Exploratory' searches will not be condoned. Similarly, the mere fact that a certain information may be relevant or useful does not establish a 'particularized need' . . . The party seeking disclosure . . . must show a 'compelling necessity' for the specific information requested."

After engaging in this balancing test, the 7th Circuit Court of Appeals specifically recognized a qualified academic freedom privilege protecting academic institutions

against the disclosure of the names and identities of persons participating in the peer review process. As pointed out above however, the court did not preclude disclosure of the documents requested, rather only the names and identities of the peers who participated in the review and the court designed a technique for redacting the documents in question to be used in such cases in order to be sure that the materials did not give away the identities of any parties, but at the same time were not redacted beyond what was absolutely necessary to ensure the anonymity of the parties.

The continuing validity of this decision however is doubtful. As the plaintiff points out in his response brief, the United States Supreme Court in the case of University of Pennsylvania v. E.E.O.C., 493 U.S. 182, 110 S.Ct. 577 (1990) denied recognition of the qualified peer review privilege in a case much similar to the Notre Dame Du Lac case. In the University of Pennsylvania case, the Supreme Court stated "Because of what might be thought of as a conflict of circuits in the approach between the 3rd and the 7th Circuit decisions in E.E.O.C. v. University of Notre Dame, supra, and because of the importance of the issue, we granted certiorari limited to the compelled disclosure question." So that it is clear that the issue that the Supreme Court sought to reach was the issue of whether or not there should be compelled disclosure of the peer review process. Part of the Court's reasoning in the University of Pennsylvania case, however, clearly stems from the fact that Congress has specifically eliminated the exemption which educational institutions enjoyed from being sued under Title VII, as it was originally enacted in

1964, thereby evincing a Congressional intent that educational institutions not enjoy any special privilege in Title VII actions. This amendment to Title VII was a considered response to what Congress believed was a wide spread and compelling problem of discrimination in educational institutions. So it is clear that the limited peer review privilege that existed at one time for cases involving alleged discrimination in educational institutions no longer exists. [PAGE 4] Because the University of Pennsylvania holding is based upon specific Congressional action in the area of Title VII discrimination lawsuits, it is not dispositive of the precise issue before this court. The precise issue before us was, in fact, addressed by the 7th Circuit several years before either the Notre Dame Du Lac or University of Pennsylvania cases in Memorial Hospital for McHenry County v. Shadur, 664 F.2d 1058 (1981). In Shadur, the court faced an allegation by a doctor that the defendant physicians, in conspiracy with others, had used the hospital's peer review committee apparatus in order to deny him staff privileges in the hospital not because of his competence, but solely to avoid having to compete with him for patients. On that issue, the plaintiff sought discovery regarding the treatment of other doctors in comparable disciplinary proceedings before the hospital. He specifically sought production of all documents relating to proceedings instituted by the hospital against physicians who had applied for or were granted admission to its medical staff. Proceedings of this kind, the court found, were admittedly privileged under the Illinois Medical Studies Act, Illinois Revised Statutes Chap. 51 Section 101 et seq. 1979, Amended 1981.

In its discussion, the 7th Circuit Court of Appeals delineated several principles to be used in making the determination before them. First, they made it clear, citing United States v. Nixon, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108 (1974), that because evidentiary privileges operate to exclude relevant evidence and thereby block the judicial fact finding function, they are not favored and, where recognized, must be narrowly construed. Second, in deciding whether the privilege asserted should be recognized, the Court held that it is important to take into account the particular factual circumstances of the case in which the issue arises. The Court should "weigh the need for truth against the importance of the relationship or policy sought to be furthered by the privileged, and the likelihood that recognition of the privilege will, in fact, protect that relationship in the factual setting of the case." Ryan v. Commissioner of Internal Revenue, 568 F.2d 531 and 543 (7th Cir. 1977).

In applying this balancing test, the court noted that the need for full disclosure of the relevant documents to the trier of fact was particularly compelling and substantial in this case because the complaint charged a conspiracy by a group of physicians to deny the plaintiff privileges and thereby destroy his practice. Such an action would not only destroy his practice, but would also reduce the availability of medical services to the community at large and tend to strangle the rights of others who might be willing to provide the same services. The Court put it this way "If successful in proving his claim, Dr. Tambone (the plaintiff) would vindicate not only his own right to practice medicine in the Woodstock area but also the strong public interest in open and fair

competition which is embodied in the Sherman Act under which the case arises." Memorial Hospital for McHenry County v. Shadur, supra, at 1062. That such a goal is important to Congress is reflected in the fact that a successful litigant in an anti trust action is allowed to collect treble damages. Such a provision is a strong statement of Congressional intent to foster and promote private antitrust actions. Fortner Enterprises Inc. v. United States Steel Corp., 394 U.S. 495, 502, 89 S.Ct. 1252, 1258, 22 L.Ed.2d 495 (1969). Recently medical costs have increased greatly. Such costs are taking up an ever increasing portion of the Gross [PAGE 5] National Product and causing great concern. Wei v. Bodner, 127 F.R.D. 91 (USDC Dist. of New Jersey, 1989).

The general policy of full disclosure announced in Shadur, supra, and the disfavored status of privileges which tend to frustrate this policy[1] require that the application of any such privilege be limited to those situations where the privilege serves an even greater good than that served by the general principle of the rules of discovery and whatever public interest exists in the particular litigation.

In the application of this balancing test the Shadur Court found that the basic purpose of the state's statutory privilege was to bolster the effectiveness of in hospitable

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[1] Wei v. Bodner, 127 F.R.D. 91 (USDC Dist of New Jersey, 1989) citing Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). They (privileges) " . . . are not lightly created nor expansively construed for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974).

peer group review committees and that this was also a very substantial interest. The Court went on to focus on the fact that in a case such as this where it is alleged that the actual peer review apparatus itself is being misapplied what goes on in the peer review committee meetings themselves is absolutely crucial to the proving of the case. It is the disciplinary proceedings themselves that are being called to question. In order to prove his case, the plaintiff must be able to present evidence to other physicians with comparable or worse records than his, were not denied staff privileges. Such evidence, if it exists, would likely be found in the hospital's records of disciplinary proceedings against other doctors and to deny the plaintiff access to this information may very well prevent him from bringing this action altogether. This reasoning flatly contradicts the arguments of the defendant that the information sought by review of these records is at best only slightly relevant and not crucial to the plaintiff's case. Defendants have argued that whatever evidence is found in these peer review proceedings of other physicians would not be of much use to the plaintiff because of the varying standards applicable to the varying types of practices, as well as the different standards which are applicable to staff members who are already permanently on the staff and the admittedly higher standard that is applied to those who seek to join the staff for the first time.

In Shadur, the 7th Circuit has clearly rebutted the argument that the information likely to be found in such peer review records will be of little value to the plaintiff. I find it illogical and indeed rather disturbing that the hospital would admit in a brief by its counsel that it does

not apply the same high standards to doctors already on its staff as it does to doctors who are attempting to enter the staff for the first time. I can find no basis in logic for justifying such a discrepancy. Indeed, if as the defendant has so often alleged in its brief, the hospital's sole purpose in conducting these peer review proceedings is to make absolutely sure that the doctors treating its patients are highly qualified, then it seems to me the same standard should apply both to doctors who are already on staff and to doctors who are seeking to join the staff. The impact on the patients being treated is the same.

This is not to say that the evidence which the petitioner may find in these files will be sufficient in and of itself to prove a case of illegal or unfair competition. I am aware, as was the Court in the Shadur case, that to prove a Sherman Act claim, the plaintiff must also demonstrate that this discriminatory denial of staff privileges that he alleges was in furtherance of the defendant's unlawful conspiracy to restrain trade. However, it cannot be [PAGE 6] denied that the evidence of discriminatory exclusionary treatment which the plaintiff seeks and hopes to find in these files is absolutely essential to his claim. And, as pointed out in the Shadur case, the inability to prove this particular fact has been held fatal in other Sherman Act claims. See Deesen v. P.G.A., 358 F.2d 165 (9th Cir. 1966).

The Shadur Court also pointed out the potential that existed within the framework of peer review groups for doctors to use them for anti competitive purposes. Citing Robinson v. McGovern, 83 FRD 79 (W.D.Pa. 1979) and Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, (5th Cir. 1978). In doing so, the 7th Circuit hit upon a concern which is shared by Congress. Indeed, in

the passing of the Health Care Quality Improvement Act, 42 USC s 11101-11152, Congress also was very aware of the potential for the abuse of peer review apparatus for anti competitive purposes. In that Act, Congress provided for immunization from liability for statements made and actions taken during peer review processes in the health care field. In that Act, Congress insulated certain medical peer review activities from antitrust liability. The Act essentially immunizes peer review action from liability but only if the action was taken in the reasonable belief that it was in the furtherance of quality health care, 42 USC s 1112, subsection a. Section 1112 of that Act provides certain procedural protections that hospitals and health care institutions must follow in the peer review processes if they wish to take advantage of the limited immunity. The Act also carves out an exception to the immunity from liability for antitrust actions brought by a state attorney general. So it is clear that Congress was extremely concerned about the abuse of such peer review procedures, and carefully drafted its legislation so as to avoid providing protection for such abuses.

The Shadur court concludes its analysis by stating that the public interest in the private enforcement of federal antitrust law is simply too strong to permit the exclusion of relevant and possibly crucial evidence by application of the hospital's privilege. In a footnote in its brief, defendant suggests that the law has evolved since the Shadur decision and that its rationale is no longer persuasive. Again in a footnote in its reply brief defendant argues that in view of the Supreme Court's analysis in the University of Pennsylvania case, the result of the Shadur court is highly questionable due to the Court's

analysis of the plaintiff's need for the information. However, this Magistrate Judge does not so lightly cast aside a 7th Circuit Court of Appeals decision which is so directly on point. And, based upon the analysis above, I believe that the Shadur Court not only addressed the issue of the plaintiff's need for the information, but made a very clear and unambiguous finding that the public interest in private enforcement of federal antitrust law in this context, meaning the context of a decision seeking to review materials of the peer review proceedings of other physicians in an antitrust case, is simply too strong to permit the exclusion of relevant and possibly crucial evidence by application of the hospital's privilege.

Wherefore, defendant's claim for conditional privilege is denied. Defendant Resurrection medical center is ordered to turn over notes, reports, documents, and all other evidence or materials relating to any peer review functions including any such functions by the hospital quality assurance committee; The Internal Medicine Quality Review Committee; The Internal Medicine Department; [PAGE 7] or any other hospital body relating to the qualifications of physicians to provide medical care during the relevant period. The names of any patients which may appear in any such records as well as the address of any such patient shall be redacted from the disclosed documents.

SO ORDERED